

# **Eyewitness Corroboration Requirements As Protections Against Wrongful Conviction: The Hidden Questions**

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The question whether a criminal defendant is guilty or innocent has been the subject of renewed attention recently.<sup>1</sup> This is a good thing. One of the most fundamental functions of our criminal justice system is to separate those who have committed crimes from those who have not. There have been times when our courts have become so preoccupied with process and privacy issues, with inquiries remote from questions of guilt or innocence, that the basic purpose of the criminal justice system has received less attention than it has deserved.<sup>2</sup>

As part of this renaissance of focus upon guilt and innocence, some commentators have suggested a requirement of corroboration of eyewitness testimony as a protection against wrongful convictions. The proposal apparently originated in an article by Professor Sandra Guerra Thompson.<sup>3</sup> For some time now, there has been a consensus that mistaken eyewitness identifications are a major cause of erroneous convictions, and some of the mechanisms for mistaken identifications are well understood.<sup>4</sup> An eyewitness corroboration rule would

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<sup>1</sup> In addition to the concern that is the subject of this article, *see infra* notes 3–5 and accompanying text, the focus upon guilt or innocence has included such subjects as capital punishment and post-conviction issues. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 522 (2006) (capital case; procedural default rules do not bar “exceptional” claims such as compelling cases of actual innocence, even at postconviction stage). In addition, the American Bar Association has added new language to its model rules placing duties on prosecutors to act upon evidence of innocence at the post-conviction stage. *See ABA House of Delegates Amends Rule Detailing Prosecutors’ Duties*, 82 CRIM. L. REP. 548 (2008).

<sup>2</sup> *See, e.g.*, *Criminal Defense Panelists Offer Methods to Prevent, Overturn Wrongful Convictions*, 82 CRIM. L. REP. 548 (2008) (advising “change” away from “motions to suppress or *Batson* challenges,” toward issues of guilt and innocence). *See also* Posting of Colin Miller to EvidenceProf Blog, <http://lawprofessors.typepad.com/evidenceprof> (Apr. 9, 2008) [hereinafter Posting].

<sup>3</sup> Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487 (2008); *see also* Posting, *supra* note 2 (reviewing Thompson and “strongly agree[ing]”). For another, similar proposal, *see* Boaz Sangero & Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 JURIMETRICS J. 43 (2007) (arguing for corroboration of all types of evidence).

<sup>4</sup> *See United States v. Downing*, 753 F.2d 1224, 1230 (3d Cir. 1985) (identifying factors that “reduce[ ] . . . eyewitnesses’ ability to perceive and remember accurately”).

respond to this problem. The proposal as it is usually stated, is a bold one, calling for an across-the-board requirement of acquittal in most instances in which the required corroboration is lacking.<sup>5</sup> Thus, Professor Thompson's justification for her proposal appears in an article written in the grand manner, developing the concept and suggesting but not specifying the details and limits. This is as it should be. But such an innovation should not be undertaken without a thorough inventory of its costs as well as its advantages, and that is the purpose of this article.

The trouble is, the corroboration proposal raises a number of questions, the answers to which may determine the wisdom of adopting it. What impact will it have upon the control of crime if it tilts the balance significantly toward acquittal of guilty persons? Would such an enactment become a kind of Violent Predators Relief Act? Would it therefore impose harm on innocent people, just as surely as wrongful convictions do? What do the proponents mean by "corroboration," anyway? What exceptions should be made to a corroboration requirement? Sensibly, proponents recognize that exceptions are needed.<sup>6</sup> But the devil is in the details.

This Commentary largely assumes that the corroboration proposal has merit and that it would have significant advantages. The first section makes this point. The essay concentrates, however, upon the question whether such a requirement can be made workable: in other words, on the issues that it raises, which might involve significant costs. The following section therefore considers whether a corroboration requirement would have a disproportionate impact upon certain kinds of offenses, particularly violent offenses. The third section considers what kinds of evidence ought to qualify as corroboration. A fourth section considers whether we as a society have an ethical duty to convict the guilty, and thus protect innocent persons from crimes, as well as to avoid convicting the innocent; and it examines the impact that the corroboration proposal might have upon any such duty. The fifth section considers whether there should be exceptions to an otherwise absolute requirement, and what they should be.

A final section contains the author's conclusions. These include an endorsement of the corroboration idea as having significant merit. Much of this article questions the corroboration proposal and suggests a need for limiting it, but nothing here is intended to take away from the accomplishment represented by the proponents' work. The author's further conclusion, however, is that corroboration should not become the subject of an absolute rule that calls for automatic acquittal, but that the proposal should be tempered by relatively broad recognition of corroboration, by exceptions for circumstances in which the risks of mistaken

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<sup>5</sup> See *supra* notes 2-3. Professor Thompson's proposal recognizes the need for exceptions, and hence it applies to "most" but not all cases.

<sup>6</sup> For example, Professor Thompson would not apply the proposed rule to eyewitnesses who knew each other or have a previous relationship. Thompson, *supra* note 3, at 1541.

identification are reduced, and by a factual review that takes into account the ultimate question of sufficient proof of guilt by weighing the evidence.

#### I. WHAT ARGUMENTS ARE THERE FOR AN EYEWITNESS CORROBORATION REQUIREMENT?

This article is concerned mainly with the arguments that should limit an eyewitness corroboration requirement. But before we consider the limits of a corroboration rule, it makes sense to consider the reasons why such a rule might be a good idea. The arguments favoring such a requirement have been well stated by others.<sup>7</sup> The following reasons, however, include several that are not emphasized in the existing literature, and they add to the arguments made by others.

In the first place, widespread police lineup practices unavoidably create conditions conducive to mistaken identifications, even if these practices are sensible and, indeed, necessary. Robbery cases, which probably involve more lineups than most other categories of crime, involve detective work that is hardly glamorous, in which officers study offense reports and correlate descriptions of perpetrators. When an arrest results, the suspect is placed in lineups featuring witnesses whose descriptions already fit the suspect.<sup>8</sup> It would make little sense for police officers to do otherwise; putting a suspect into lineups for witnesses whose descriptions vary significantly from him would waste resources, harass witnesses, and mistreat the suspect. The result, however, is that we ask witnesses whether they can identify a person in a lineup that contains a suspect fitting the description that the witnesses have already given. Although this procedure makes sense, it increases the odds of the mistaken identification of a similar suspect who is not the perpetrator.

In the second place, it is doubtful whether procedures can be devised that will dramatically alter this tendency toward error. Commentators have offered many suggestions. These include sequential lineups, express communication to the witnesses that the perpetrator may not be present, prevention of suggestion, double-blind processes, and the like. So far, experimental data have produced mixed results about whether these alternatives really reduce misidentifications.<sup>9</sup> Further experimentation is warranted, but consideration of other alternatives is also warranted.

In the third place, eyewitness identification is essential to a functioning criminal justice system. All criminal convictions depend upon proper

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<sup>7</sup> See *supra* notes 2–3.

<sup>8</sup> See DAVID CRUMP & WILLIAM J. MERTENS, *THE STORY OF A CRIMINAL CASE: THE STATE V. ALBERT DELMAN GREENE* 8–13 (2d ed. 2001) (showing actual lineup procedures and documents taken from a real case and discussing the danger of misidentification).

<sup>9</sup> For example, one experiment with these methods showed that a witness was “more than three times as likely to pick the wrong person [in a sequential double-blind lineup, with each person presented individually] as a witness to a simultaneous lineup.” Mark Hansen, *That's Him!— Or Is It?*, 92 A.B.A. J., Aug. 2006, at 12–13. But the study has been subjected to criticism. *Id.*

identification of the defendant as the perpetrator. In many cases, eyewitness evidence is the main or only evidence that supplies this identification. For all of its faults, we cannot avoid using this method. At the same time, other types of evidence—scientific evidence and circumstantial evidence—exhibit serious flaws as well.<sup>10</sup>

In the fourth place, misidentifications are frequent. My own study of six capital cases showed that two of them involved serious misidentifications. In one case, two different witnesses identified police officers who were stand-ins in a lineup. One eyewitness in the same case identified the victim's husband, who resembled the perpetrator, and the identification led to the arrest of this innocent man shortly after he had discovered his wife's murder. In both instances, the errors were quickly detected, and it is inconceivable that they could have led to indictment or trial, much less conviction.<sup>11</sup> But the probability of other misidentifications that could lead to conviction is certainly present. One commentator has found an approximately 3.3%–5% mistaken conviction rate in a sample of rape-murder cases.<sup>12</sup> I remain skeptical about this conclusion, believing that for structural reasons we never can attain accurate statistical information.<sup>13</sup> But the reasons sketched above give ample reason to conclude that mistaken eyewitness identifications are a major cause of erroneous convictions.

Finally, a requirement of eyewitness corroboration would take advantage of a powerful logical technique for securing greater accuracy. Specifically, Bayes' Theorem is a mathematical construct that tells us the increase in probability of the existence of a fact that is produced by additional independent evidence. Imagine a robbery case in which we have only 50% confidence in the eyewitness identifications. But the suspect exhibits a characteristic, independent of the identifications, that occurs in only 1 in 1000 individuals in the population: for example, possession of an unusual article, similar to one taken in the robbery. Bayes' Theorem tells us that our confidence in the evidence now increases dramatically. We now know that the probability of a random person in the

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<sup>10</sup> See *infra* notes 25–27 and accompanying text.

<sup>11</sup> DAVID CRUMP & GEORGE JACOBS, A CAPITAL CASE IN AMERICA: HOW TODAY'S JUSTICE SYSTEM HANDLES DEATH PENALTY CASES FROM CRIME SCENE TO ULTIMATE EXECUTION OF SENTENCE 233 (2000).

<sup>12</sup> D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762 (2007).

<sup>13</sup> My skepticism reflects (among other issues) the assumption in this study that "DNA exonerations" are accurate enough to support statistical calculations—not just as a measure of unsure convictions, but of actual innocence. *Id.* At least one study, however, has found a significant error rate in DNA results due to laboratory errors. See DAVID CRUMP ET AL., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES 227 (2005) (describing 1 in 200 occurrence of false positives, with false negatives presumably being higher in frequency). The actual size of this effect is unknown and probably unknowable, and it could be large enough to erode the statistical significance of the 3.3%–5% result. It should immediately be added that there are few perfect statistical studies. This basis for skepticism, even if meritorious, does not negate the force of the study. It merely puts it in a category with other statistical studies.

population displaying similarly strong evidence of guilt is approximately 0.001.<sup>14</sup> And this result follows after eyewitness evidence with only a 0.50 probability of accuracy. Much greater confidence can result if the eyewitness evidence is more likely to be accurate. An eyewitness corroboration requirement is designed to use this effect of Bayes' Theorem, and it has great promise for doing so.

These arguments are the case for the corroboration requirement. But a rule should not be adopted on the sole basis of the arguments for it when opposing issues remain unexamined. What would be the effect of such a rule on the other goals of the criminal justice system? Would we increase other kinds of harm to innocent people? Would some crimes become unprovable? What is meant by corroboration? What exceptions should there be? And what shape or form should a rule requiring corroboration take, if one is to be adopted?

## II. COULD A CORROBORATION REQUIREMENT BECOME EQUIVALENT TO A VIOLENT PREDATORS RELIEF ACT?

Consider a hypothetical case, based upon the so-called Virginia Tech massacre. On April 16, 2007, a student named Seung-Hui Cho entered the campus of Virginia Polytech Institute and State University (Virginia Tech) in Blacksburg, Virginia.<sup>15</sup> Cho shot and killed thirty-two people and wounded many more before committing suicide. The Virginia Tech killings were the deadliest school shooting in United States history.<sup>16</sup>

Support for an unqualified corroboration requirement can be tested by hypothesizing a slightly different case, based on the same massacre. Imagine that Cho had made his escape, as many violent predators do. Imagine that he had wiped down and successfully disposed of his weapons, or destroyed them. Imagine that Cho had then been brought to justice, in a trial at which the witnesses were those who observed him in the act of killing, including people wounded at close range. In such a case, would not a corroboration requirement mean that the judge would be forced to withdraw the case from the jury and grant an automatic judgment of acquittal?

If one thinks about the kinds of cases that would be affected by an eyewitness corroboration requirement, one probably will come to the conclusion that crimes of violence would most often call for per se acquittals. One can imagine, for example, the strategic rapist, robber, or serial murderer. This purposeful individual may learn not to worry about the presence of eyewitnesses and to worry instead about preventing any evidence of his presence from remaining at the scene, as well as getting rid of all fruits and implements of the crime. A law about eyewitness

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<sup>14</sup> For a discussion of Bayes' Theorem, together with a chart showing antecedent and revised probabilities, see CRUMP ET AL., *supra* note 13, at 225–27.

<sup>15</sup> See Wikipedia, Virginia Tech Massacre, [http://en.wikipedia.org/wiki/Virginia\\_Tech\\_Massacre](http://en.wikipedia.org/wiki/Virginia_Tech_Massacre) (last visited Apr. 14, 2009).

<sup>16</sup> *Id.*

corroboration should be written so as to make it difficult for the strategic predator to benefit from these methods.

### III. WHAT IS MEANT BY "CORROBORATION"?

As an assistant district attorney, I once tried a case involving a homicide that occurred in a bar, but in which the defendant had been arrested while walking home.<sup>17</sup> A number of individuals inside the bar were able to identify the defendant, and they did so at trial. The defendant's firearm was never recovered. No one in the bar claimed to be acquainted with the defendant, but he had distinctive features, and the jury believed that the eyewitnesses were credible. The fact that the defendant was arrested while walking between the bar and his home was introduced into evidence, but he could have been walking home from someplace else.

In such a case, what do we mean by "corroboration"? The first issue of note is whether one eyewitness can corroborate another eyewitness. If the answer is yes, the efficacy of the corroboration requirement is significantly reduced, because it is probable that in such circumstances the chances of mistake apply uniformly to all eyewitnesses. Then, what about the defendant's location at the time of his arrest? Is that sufficient as corroboration? Finding a person walking in the direction of his home and away from the scene of a crime does not sound like a circumstance that should be given great weight as evidence.

This particular dilemma, which is concealed within the general idea of a corroboration requirement, is well known to statisticians. One cannot simultaneously minimize both Type I errors (false positives) and Type II errors (false negatives).<sup>18</sup> The requirements that the jury find proof of guilt beyond a reasonable doubt, and that the judge ensure that there is sufficient evidence to carry this burden before letting the jury decide, are rules that minimize Type I errors (mistaken convictions) while vastly increasing Type II errors (mistaken acquittals).<sup>19</sup> The proposed eyewitness corroboration requirement would greatly enhance this effect, probably more than any other single rule we now enforce. And here is the point. The effect across different categories of crimes would not be the same. If we insist upon corroboration that, taken by itself, provides strong evidence of the perpetrator's identity, we will acquit violent predators disproportionately and subject innocent people to future violent crimes. On the other hand, if we adopt such a broad and loose definition of what is sufficient as

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<sup>17</sup> The defendant's conviction, which occurred too many years ago to make its documentation reasonable, did not result in an appeal, and as is the case with most criminal justice determinations, it is not memorialized by any published authority.

<sup>18</sup> See DAVID CRUMP, *HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY* 426 (2001) (explaining the "tradeoff" between these errors).

<sup>19</sup> See *id.* (explaining that minimizing Type I errors in convictions, by a high proof burden, inevitably increases Type II errors, in the form of erroneous acquittals).

corroboration that “walking-home evidence” suffices,<sup>20</sup> we may dilute the proposal.

Some states that have imposed corroboration requirements in certain cases<sup>21</sup> have applied these requirements so that two eyewitnesses subject to the requirement *cannot* corroborate each other.<sup>22</sup> The meaning of that rule would be that the Virginia Tech massacre case hypothesized above, in which the perpetrator is identified by multiple eyewitnesses but leaves no physical evidence of himself and destroys the implements of the crime, would enjoy an automatic acquittal. On the other hand, corroboration requirements have generally been interpreted so that relatively loose circumstantial evidence will suffice. The corroborative information need not convincingly tie the defendant to the crime; it only needs to provide an additional circumstance pointing in that general direction.<sup>23</sup> Some states, in order to satisfy the corroboration requirement, have broadly admitted evidence of other crimes even when these extraneous offenses would not normally be admissible.<sup>24</sup> For example, notwithstanding Federal Rule of Evidence 404(b) or its equivalent, a robbery that includes corroborative evidence of the identity of the perpetrator of a robbery-murder would become admissible in the trial of the robbery-murder. Thus, whether we should look for corroboration by relaxing Rule 404(b) is a question that is raised by the corroboration proposal.

It is worth adding that no category of evidence is perfect. And just as there is skepticism about eyewitness evidence, there is skepticism about other kinds of evidence. Sometimes, courts have ordered acquittals in cases involving very strong circumstantial evidence, of a kind that seemingly furnishes more than sufficient proof.<sup>25</sup> And scientific evidence is vulnerable to laboratory errors. Even

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<sup>20</sup> See *supra* text accompanying note 17.

<sup>21</sup> See 23 C. J. S. *Criminal Law* § 1375 (2009) (stating that when corroboration of accomplice eyewitness testimony is required, insufficiency of the one accomplice’s testimony to corroborate another’s testimony is the “general rule”).

<sup>22</sup> Consider TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2005) [hereinafter TEX. CODE], which provides that a conviction “cannot be had upon the testimony of an accomplice unless corroborated by other evidence . . . .” The courts apply this rule by “eliminat[ing] from consideration” the testimony of any accomplices and then considering whether there is other evidence that “tends to connect the defendant with the commission of the offense.” *Reed v. State*, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988).

<sup>23</sup> The cases vary, with some requiring relatively substantial corroboration and others requiring much less. Compare *Barnes v. State*, 62 S.W.3d 288, 301 (Tex. App. 2001) (stating that “[e]ven apparently insignificant evidence” can be enough), with *Gamez v. State*, 737 S.W.2d 315, 323 n.10 (Tex. Crim. App. 1987) (requiring corroboration that makes the accomplice testimony “more likely [true] than not”). The latter standard has been overruled in favor of a standard that requires only that the evidence “tend[s] to connect the defendant with the offense committed.” TEX. CODE, *supra* note 22.

<sup>24</sup> See *Ramirez v. State*, No. 03-05-00219-CR, 2006 WL 2449433, at \*1 (Tex. App. Aug. 25, 2006) (unpublished memorandum opinion).

<sup>25</sup> See, e.g., *Stogsdill v. State*, 552 S.W.2d 481 (Tex. Crim. App. 1977) (ordering acquittal in case without eyewitness but with very strong circumstantial evidence). For suggestions that the court

DNA evidence, with its seemingly staggering statistical estimates, is only as good as experimental errors allow it to be, and these potential errors can mean that the statistical estimates are meaningless.<sup>26</sup> Proof by mathematics has been vigorously criticized,<sup>27</sup> sometimes in ways that seem inaccurate.<sup>28</sup> Ironically, in fact, the courts show a subtle preference for eyewitness testimony rather than for other kinds of evidence, and it is this tendency that the corroboration requirement is intended to limit.<sup>29</sup> But here is the point. There is corroboration and then there is corroboration; and some of it is good, some not so good. Most of the time, we can point to some circumstance as “corroborating” an eyewitness under at least some set of assumptions that a juror might accept.<sup>30</sup> The real question, then, is not so much whether an eyewitness corroboration requirement would produce useful results—it would—but rather, what we are willing to consider as fulfilling the requirement, in what kinds of cases.

These are not criticisms of the general idea of an eyewitness corroboration requirement. Every useful legal doctrine requires definition more specific than its underlying policy. In other words, every legal rule requires adjustments that mitigate its worst side effects, and this article is merely an attempt to examine those issues in the case of the eyewitness corroboration proposal.

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in *Stogsdill* failed to apply the evidentiary standard correctly and was overly suspicious of the evidence, see CRUMP ET AL., *supra* note 13, at 222.

<sup>26</sup> See CRUMP ET AL., *supra* note 13, at 223–27 (discussing limitations of DNA evidence).

<sup>27</sup> See *People v. Collins*, 438 P.2d 33 (Cal. 1968) (reversing conviction based on probabilistic evidence and arguments).

<sup>28</sup> *Collins*, for example, is based on three alleged fallacies in the evidence: (1) lack of complete “independence” in the factors used to estimate probabilities, (2) the estimation of the numbers used, and (3) the character of the result as showing not a probability of guilt but only the probability of random defendants exhibiting the observed characteristics. The trouble with labeling these arguments as fallacies is that the numbers were never presented to the jury as more than estimates, no natural phenomenon is likely to exhibit complete independence, and it was never suggested to the jury that the evidence showed an actual probability of guilt but merely an example of useful reasoning. Furthermore, the evidence could have been of value to the jury in understanding and assessing the evidence. For a discussion of both sides of this issue, see PAUL F. ROTHSTEIN ET AL., *EVIDENCE: CASE, MATERIALS, AND PROBLEMS* 490–98 (3d ed. 2006).

<sup>29</sup> See CRUMP ET AL., *supra* note 13, at 227–28.

<sup>30</sup> See *supra* notes 17, 19 and accompanying text (giving example of “corroboration” consisting of evidence that defendant was arrested while walking home from the general direction of the crime scene and suggesting that accepting this evidence as sufficient might make the proposal meaningless).



#### IV. IS THERE A BALANCE BETWEEN THE GOALS OF ACQUITTING THE INNOCENT AND CONVICTING THE GUILTY?

##### A. *Is There a Duty to Do Both?*

Proponents of an eyewitness corroboration requirement emphasize the importance of acquitting the innocent. Obviously, the ethical duty of a society to minimize conviction of those who are not guilty is widely recognized. It may also be useful, however, to give at least some attention to the question whether protecting the innocent from future crimes by the guilty is an ethical duty.

The unfortunate fact is that some societies have oppressed innocent people by underprosecuting particular crimes, and they still do. The key thing to realize here is that a state policy favoring erroneous acquittal results in uneven protection of different classes of people. Preferred groups will be disproportionately free of the costs created by either erroneous acquittal or erroneous conviction, and the costs of unredressed crime will fall upon disfavored groups. *Kristallnacht*, or the “Night of Broken Glass,” was among the early events that set the Holocaust in motion. The policy of the Nazi regime was to tolerate crimes of vandalism or worse against Jewish people.<sup>31</sup> One can conclude that in doing so, the society acted unethically. In the United States, the Ku Klux Klan Act was a response to the failure of the States to provide protection to innocent people against violent crimes.<sup>32</sup> Historically (and arguably still), this country has made crimes of child abuse and rape extraordinarily difficult to prosecute, with corroboration requirements figuring prominently in the reasons.<sup>33</sup> Still today, it is easy to make the argument that our treatment of crimes against children is unethical. Parents vote and hire lawyers; children do not. The result is that we have accepted arguments tilted toward protecting parents over abused children. Multiple privileges, rules that exclude reliable evidence, and principles that make the detection of crimes difficult are among the reasons.<sup>34</sup>

##### B. *The Harm Caused by Erroneous Judgments: Conviction of the Innocent and Acquittal of the Guilty*

One factor in considering the ethical issues caused by mistaken judgments is to compare the harm caused by mistaken convictions to mistaken acquittals. The disadvantages attributable to erroneous convictions may seem obvious, but they are worth examining in the context of concrete cases. On the other hand, the harm

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<sup>31</sup> See Wikipedia, *Kristallnacht*, <http://en.wikipedia.org/wiki/Kristallnacht> (last visited Apr. 14, 2009).

<sup>32</sup> See CRUMP ET AL., *supra* note 13, at 216 (discussing the ethical duties of society, with description of this example).

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

caused by erroneous acquittals is less direct and obvious, but nevertheless real, and it also bears examination.<sup>35</sup>

Consider a typical case of misidentification. Two rape victims picked William Jackson out of a police lineup in 1977. A jury convicted Jackson, and he began serving a sentence of 14 to 50 years.<sup>36</sup> Five years later, officers arrested a loitering suspect wearing a ski mask with an array of burglary tools. He turned out to be Dr. Edward Jackson, who was an unlikely arrestee: a prominent local internist.<sup>37</sup> A search of the second Jackson's car revealed a long list of rape victims, suggesting that he was the "Granville rapist," suspected of nearly one hundred assaults, including the two for which William Jackson had been sentenced. William Jackson was released seven hours after Dr. Edward Jackson was indicted. The newly freed prisoner declined to criticize the mistaken witnesses, saying, "It ain't their fault," but he was understandably critical of the system that had convicted him.<sup>38</sup>

In such a case, there are both obvious and hidden losses.<sup>39</sup> There is the interest of the convicted or arrested person. William Jackson was stabbed and repeatedly assaulted during his imprisonment and said, "They took away part of my life, part of my youth. I spent five years down there, and all they said was 'We're sorry.'"<sup>40</sup> Then, too, there is the interest of the victims. The factually guilty person, who is still at large, may continue to commit further crimes. One can even argue that some criminals suffer losses themselves from not being stopped before their crimes multiply or escalate in severity. Obviously, future victims of similar offenses, survivors or families of each of these people, and other affected people, are harmed by a wrongful conviction. So are citizens in the community and the body politic, as various kinds of indirect harm continue while the wrong person is convicted and the actual perpetrator is loose, including an obviously important factor: people's willingness to follow the law, enforce the law, and respect the law. Public doubts arise, along with confusion about what would otherwise be strongly held faith in the system. Everyone has read about cases such as William Jackson's in their newspapers, and it is difficult to know how many such cases actually exist that do not appear in the newspapers.

Let us also consider a case of erroneous acquittal. One example is the nightmarish case of Zachary Thomas Langley.<sup>41</sup> Langley was arrested for murder, and while in jail away from drugs, he apparently became remorseful. He

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<sup>35</sup> The text and authorities in the following paragraphs borrow somewhat from CRUMP ET AL., *supra* note 13, at 210-15.

<sup>36</sup> See "We're Sorry": A Case of Mistaken Identity, *TIME*, Oct. 4, 1982, at 45 [hereinafter "We're Sorry"].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See generally CRUMP ET AL., *supra* note 13, at 215-16 (discussing these losses).

<sup>40</sup> See "We're Sorry", *supra* note 36.

<sup>41</sup> See CRUMP ET AL., *supra* note 13, at 210-11. "Langley" is a pseudonym.

confessed to the murder to an assistant district attorney and also to his heroin supplier. The murder itself was shockingly brutal and cruel. The body of the victim, a young woman who lived in an apartment near Langley, was discovered nude in a pool of blood. The crime scene photograph showed her to have been savagely beaten. Perhaps the most disturbing detail was a broom handle with a wire in its tip that had the victim's blood and flesh on it. An autopsy showed that the broom handle, with the wire, had been inserted into the victim's vagina.

At trial, the principal evidence identifying Langley as the killer consisted of the testimony of the Assistant District Attorney and of Langley's heroin supplier. The alleged confessions contained various details, some of which were not general public knowledge, but the two witnesses' accounts dovetailed. No fingerprints or other evidence were found, however, to link Langley to the crime scene, and he did not testify. The jury acquitted. After trial, the jurors explained that they doubted the testimony of the prosecutor because, well, he was an Assistant District Attorney. They doubted the testimony of Langley's drug supplier because he was a drug dealer.

Promptly after his release, Langley broke into the residence of another young woman and assaulted her. This crime, too, was brutal. Langley fractured the victim's jaw and injured her in other ways. He tied the victim to her bed and set the mattress on fire. The crime scene photographs included close-ups of the blackened, charred hands of the victim and other burned parts of her body. But this victim survived, and she identified Langley.

Arguably, the harm caused by an erroneous acquittal in a case such as Langley's is significant. They include impairments of the interests of the first victim, the second victim, the survivors of both, nearby residents, citizens generally, and the body politic. A different jury probably would have convicted Langley the first time, and the suffering of the second victim would have been prevented. In fact, one might consider the possibility that future innocent persons, arrested and falsely accused, could suffer harm from Langley's acquittal, in the form of an increased tendency to convict among citizens aware of wrongful acquittals.

This case may have relevance to the proposal of an eyewitness corroboration requirement. Would the proponents support the automatic acquittal of Langley in the second case, too, without allowing a jury even to consider his guilt or innocence? Langley did not leave fingerprints or other corroborative evidence at either crime scene, and the circumstances, such as his nearby residence, furnished only the thinnest of support of the eyewitness identification. Would proponents of a corroboration requirement agree to the relaxation of Rule 404(b) to allow the defendant's confessions in the first case to corroborate the identification in the second case (since most people would infer the existence of corroboration from this evidence)?<sup>42</sup> And finally, don't we as a society have an ethical duty at some

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<sup>42</sup> Cf. *supra* note 24 and accompanying text (discussing the 404(b) issue).

point to Langley's third victim, or fourth, or fifth, or twentieth, to protect them better?

*C. The "n Controversy": To Prevent a Single Erroneous Conviction, How Many Guilty Persons Should Be Acquitted?*

One of the best law review articles ever written on any subject is Alexander ("Sasha") Volokh's "*n Guilty Men*."<sup>43</sup> Volokh describes the "*n* controversy," beginning with a pronouncement of William Blackstone that has become known as the Blackstone Ratio: "[B]etter that ten guilty persons escape, than that one innocent suffer."<sup>44</sup> But why a ratio of 10:1, Volokh asks? This question introduces the factor he calls "*n*": the number of guilty people who ought to be released to prevent the conviction of one innocent person. Different people want different values of *n*. After all, Benjamin Franklin thought "[t]hat it is better that a hundred guilty persons should escape than one innocent person should suffer."<sup>45</sup> Volokh builds a catalog of references to common numbers such as one, five, twelve, twenty, "hundreds," one thousand, and five thousand, which courts or commentators have plugged in as values for *n*.<sup>46</sup>

A simplistic approach might regard very high or even infinite values of *n* as giving a "warm fuzzy feeling," but Volokh provides ample support for skepticism about this conclusion. He quotes Jeremy Bentham:

[W]e must be on our guard against those sentimental exaggerations which tend to give crime impunity . . . . Public applause has been, so to speak, set up to auction. At first it was said to be better to save several guilty men, than to condemn a single innocent man; others . . . fix the number ten; a third made this ten a hundred, and a fourth made it a thousand. All these candidates . . . have been outstripped by . . . writers, who hold, that, in no case, ought an accused person to be condemned, unless evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished.<sup>47</sup>

Volokh also sees "a golden age of *n*-skepticism" in Britain, thanks, perhaps, to the efforts of the Irish Republican Army. Thus, "[o]ne British writer asks what use *n* = 10 is 'if those [ten] guilty men use their freedom to plant a bomb that kills

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<sup>43</sup> Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

<sup>44</sup> *Id.* at 174 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*352).

<sup>45</sup> *Id.* at 175 (citing Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in 11 THE WORKS OF BENJAMIN FRANKLIN 11, 13 (John Bigelow ed., fed. ed. 1904) (emphasis added)).

<sup>46</sup> *Id.* at 175, 187–88.

<sup>47</sup> *Id.* at 195.

[a hundred] school children.”<sup>48</sup> And then, just to turn the tables on the British, Volokh tells the story of a Chinese law professor, who listened to a British lawyer explain why it was better that ninety-nine guilty men go free than that one innocent man be executed. “The Chinese professor thought for a second and asked, ‘Better for whom?’”<sup>49</sup> Volokh even quotes from *The Godfather*: “Mario Puzo’s Don Clericuzio heard about letting a hundred guilty men go free and, ‘[s]truck almost dumb by the beauty of the concept . . . became an ardent patriot.’”<sup>50</sup> In other words, high values of  $n$  do amount to a Violent Predator’s Relief Act, at least in literature.

There are those who believe that the solution to the  $n$  controversy is simple: “Just convict all the guilty and acquit all the innocent, say letter writers, state supreme courts, Ulysses S. Grant, and the Chinese.”<sup>51</sup> Volokh’s article reminds us, however, that this solution is incomplete, to put the matter charitably. We have to have process. And every valid principle, as well as every filigree or ornament that we put upon the process, tilts the value of  $n$ , whether we like it or not.

Again, it is impossible simultaneously to minimize both Type I errors (false positives) and Type II errors (false negatives),<sup>52</sup> at least without obtaining better data. One point that emerges clearly from Volokh’s analysis is that every determination of guilt or innocence is, and always will be, a compromise between these two goals. Anyone who wishes the problem away, by advocating merely that we convict the guilty and acquit the innocent, really is refusing to come to grips with the problem.

## V. EXCEPTIONS TO THE CORROBORATION REQUIREMENT

The existing doctrines controlling other kinds of corroboration requirements suggest that exceptions to such a requirement may be necessary in the eyewitness case, too. For example, some jurisdictions require corroboration of “accomplice witnesses.”<sup>53</sup> A participant in the crime who testifies against a co-participant must be supported by other circumstances suggesting guilt, in order to furnish legally sufficient evidence. It is easy to see that such a corroboration requirement may have positive results. But for differing reasons, these jurisdictions have been

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<sup>48</sup> *Id.* at 197 (quoting Peregrine Worsthorne, *We Are All Guilty*, SUNDAY TELEGRAPH (London), Mar. 24, 1991, at 22).

<sup>49</sup> *Id.* at 211.

<sup>50</sup> *Id.* at 175 (quoting MARIO PUZO, *THE LAST DON* 58 (1996)).

<sup>51</sup> *Id.* at 209.

<sup>52</sup> *Cf.* CRUMP ET AL., *supra* note 13, at 209–10 (discussing inevitable effect of every process decision on the value of  $n$ ).

<sup>53</sup> *See generally* AM. JUR. 2D *Evidence* § 1408 (2008) (discussing the general rule, adopted in “many jurisdictions”). *See, e.g.*, TEX. CODE, *supra* note 22. *See also supra* notes 13–15 (discussing the meaning of this requirement).

persuaded to create exceptions, because the corroboration requirement otherwise would make whole categories of crime unprosecutable.

For example, consider the crime of receiving stolen property. Often, it is impossible to obtain a conviction in such a case without the testimony of the thief who sold the property to the receiver. If the only corroboration requirement is of the defendant's participation in the transaction, corroboration requirements may not be difficult to meet; the problem arises, however, if a jurisdiction insists upon corroboration of evidence that the receiver *knew* that the property was stolen. Generally, the only evidence is the thief's testimony about the transaction or its particulars. Given this difficulty, some jurisdictions have created an exception: accomplice testimony usually must be corroborated, but not in cases of receiving stolen property.<sup>54</sup> Another example, perhaps even more convincing, is furnished by the crime of compelling prostitution. The proof of some crime elements is likely to rest on the uncorroborated testimony of the prostitute who is the ostensible victim, but that person, unfortunately, is also literally an accomplice. Therefore, an exception to the accomplice corroboration requirement is needed for the crime of compelling prostitution,<sup>55</sup> if we are to enforce the law at all.

What exceptions might be appropriate in the case of an eyewitness corroboration requirement? Recognizing the problem, Professor Thompson offers at least one example: she would not impose the corroboration requirement if the eyewitness "knows" the defendant from a "previous relationship."<sup>56</sup> Without this sensible exception, the corroboration requirement would have many unintended results. For example, domestic violence cases might become virtually unprosecutable. The victim may be the only eyewitness, and typically, corroboration of her identification of the perpetrator will be lacking.

The problem remains, however: what does it mean for the witness to "know" the defendant? I once had a case in which the accused perpetrator of an assault was a deliveryman who had transported furniture to the victim's residence earlier in the day.<sup>57</sup> Did the eyewitness, then, "know" the defendant? Probably not, if the words "know" and "relationship" are taken in their usual senses. And if not, are the similar facial features of the two individuals sufficient to provide "corroboration"? Again, probably not, unless we are to minimize the corroboration requirement. The deliveryman's crime, otherwise, becomes unprosecutable.

An exception for eyewitnesses who "know" the defendant conforms to common sense, but writing it into law in a way that would distinguish cases reliably would be difficult. And I wonder whether other exceptions may be

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<sup>54</sup> See, e.g., TEX. PENAL CODE ANN. § 31.03(b)(2) (Vernon 2003) (allowing uncorroborated testimony of an accomplice to prove defendant's knowledge or intent).

<sup>55</sup> See, e.g., TEX. PENAL CODE ANN. § 43.06 (Vernon 2003).

<sup>56</sup> Thompson, *supra* note 3, at 1541.

<sup>57</sup> This case, like the one described in note 17 above, was not memorialized, and the documents are unavailable.

needed. Should there be an exception if the defendant is reliably identified by some unique facial detail? Are there some kinds of offenses that should be taken out of the proposed rule, as there are in the case of accomplice corroboration requirements? The devil is in the details.

## VI. CONCLUSION

It seems likely that mistaken convictions could be reduced by a rule depending upon the presence or absence of eyewitness corroboration. Identification evidence is subject to recognized types of errors, and these errors probably account for a large percentage of erroneous convictions. Unfortunately, however, a flat rule requiring corroboration would have unpredictable but surely disadvantageous side effects. It would reduce convictions of the guilty as well. And such a rule might result disproportionately in automatic acquittals of violent predators. Those kinds of mistaken judgments would oppress innocent victims just as surely as erroneous acquittals would. One might be tempted to draw a distinction between these two types of errors, by asserting that the affirmative conduct of the state in imprisoning a person who is not guilty is worse than the inaction that permits a predator to impose future suffering upon innocent victims. But at some point, the side effects of a deliberate choice for an increase in erroneous acquittals becomes serious enough to create an imbalance, in which the inaction of the state, which facilitates suffering inflicted by acquitted guilty people, becomes an ethical lapse itself.

Therefore, the problem may not be one of deciding whether a corroboration rule would be desirable, but rather one of deciding what significance to give to corroboration. For example, can one eyewitness furnish sufficient corroboration of another? Should there be a two-eyewitness exception? States with other kinds of corroboration requirements do not always accept the two-witness idea; they reason that one affected witness should not corroborate another. The trouble is, a rule that strictly limited the permissible types of corroboration would have more negative effects than one that broadly considered many different forms of qualifying evidence. This principle leads to the argument that the two-eyewitness case should be sufficient to submit to the jury. But there are reasons for the contrary conclusion. If the factors known to enhance mistaken identifications are present for one witness, they likely are present for other eyewitnesses too, and a two-witness exception might undermine the benefits of the corroboration requirement.

Then, too, there is the question whether evidence of very slight weight should furnish corroboration, such as the fact that the defendant is found walking away from the general direction of the crime and toward his home. Furthermore, there is the question, if we require corroboration, of whether we should look to other generally similar crimes committed by the same defendant. A Bayesian analysis suggests that evidence of this kind would furnish powerful corroboration, but one suspects that the proponents of the corroboration requirement may not be willing to relax prohibitions such as that in Federal Rule of Evidence 404(b).

Next, there is the question of necessary exceptions. The recognition that there should be an exception for an eyewitness who “knows” the perpetrator is obvious to proponents, and indeed, disastrous results would follow otherwise; but how do we write this idea into a rule? The real issue is whether the witness has seen the other person enough to make a reliable identification, but that is a vague standard. It begs the question, in fact. The issue then resembles asking whether there is evidence from which a jury could find proof beyond a reasonable doubt. Beyond the “known perpetrator” question, should there be an exception for identifications bolstered by a sufficiently unique physical characteristic, such as an unusual tattoo, a birthmark, a scar, or a broken nose? That approach, too, begins to fade into Never-Never Land if it requires merely a sufficiently unique physical characteristic, because everyone’s combination of features is unique.

Perhaps the best way to embody a corroboration requirement into a rule is, first, to require a reviewing court to consider the factual as well as the legal sufficiency of the evidence. Some states impose this requirement upon their courts, requiring them to go beyond the standard for legal sufficiency and to weigh the strength of the evidence factually and holistically. And then, the rule could direct the court to consider specifically, in cases involving eyewitness identifications, whether the presence or absence of corroborating evidence undermines the jury’s finding of guilt. This proposal might avoid many convictions based upon mistaken testimony. It calls for a more modest step than a flat rule. But given the uncertainty of the answers to questions raised by a more dramatic proposal—a proposal that would treat uncorroborated eyewitness testimony as automatically insufficient—perhaps a more modest approach is preferable, at least as a first step.